SENATE FISH AND GAME
EXHIBIT NO. 4
DATE 1/13/11
BILL NO. SB 133

TESTIMONY OF JIM BROWN

IN SUPPORT OF SB133

January 13, 2011

- Mr. Chairman, members of the Committee
- My name is Jim Brown,
- I am a resident of Dillon, Montana
- I rise today in support of SB133 as this was a bill that I requested that my Senator, Senator Barrett, introduce this legislation.
- This bill would further protect the constitutional right of every Montanan to harvest wild fish and wild game animals under Article IX, Section 7 of the Montana Constitution.
- This bill preserves Montana's harvesting heritage by prohibiting the harassment of sportsmen and sportswomen prohibiting the harassment or intimidation of an individual for purchasing a hunting license and/or engaging in the lawful taking of a wild animal.
- More specifically, this prohibition prohibits persons from using email, the internet, or any electronic communication to engage in such threatening activity.
- With exceptions for when the right of the public to know outweighs the right of an individual's privacy, the bill also requires that the private information of persons who apply for a license be kept free from public disclosure.
- I requested that Senator Barrett introduce this bill after reading about, and hearing about, the numerous incidences of hunter harassment that occurred as a result of the wolf hunt held in Idaho and Montana in 2009.
- In particular, I became aware of the abuse being heaped on persons who lawfully hunt after reading about the first person in Idaho to lawfully take a wolf. That fellow was subject to numerous threatening emails and phone calls after his name became publicly known and after his personal information was posted online as a result of his information being readily available from Idaho's fish and game agency. This gentlemen was targeted for abuse for merely engaging in a lawful activity.
- After reviewing a website which listed publicly the name and contact information for every Idaho hunter who had taken a wolf during the 2009 hunting season (122 of them), I thought it might be a good idea for Montana to get ahead of this issue and to protect the privacy rights of those who lawfully hunt here.
- I have brought with me today several articles that discusses these events, and will share those with the Committee and ask that they be entered into the record.
- In response to the harassment being suffered by Idaho hunters, the Idaho legislature passed, and the Governor of Idaho signed into law a bill that accomplishes what Senator Barrett's bill seeks to do today – prohibit the public disclosure of personal information collected as a result of applying for a hunting license and prohibit the harassment of persons who lawfully purchase a hunting license and lawfully take

- Presumably, one of the concerns that will be raised on this bill is whether it is too broad or too vague and violates our Constitution. I would remind this Committee that Montana has a statute presently that prohibits hunter harassment.
- That statute, MCA 87-3-142 was challenged roughly 15 years ago and our State Supreme Court determined in State v. Lilburn, 265 Mont. 258 that all sections of our hunter harassment statute pass constitutional muster. I suspect that the provisions of this bill, if enacted, will survive constitutional challenge as well.
- I have brought a copy of that legal case with me today, and will submit that for the record as well.
- Further, I suspect that there will be those that will challenge this bill on the grounds that it violates the right to know provision of our constitution. I am not convinced that is an argument that will carry legal water.
- As this Committee knows, Montana has an express constitutional right to privacy that trumps that right to know when an individual's privacy interest exceeds the merits of public disclosure. This provision is, of course, Article I, Section 9 of the Montana Constitution.
- In this instance, it seems to me a court would find that the right of hunters to have their personal information protected from public disclosure through the use of a information/records request outweighs the public's right to know the identity and contact information of persons who lawfully take game.
- What needs to be kept in mind here is that any form of harassment is not tolerable. This bill sends a message that the people of Montana will not allow persons who exercise their constitutional rights to be subject to abuse and ridicule as a result of exercising those rights.
- I commend Senator Barrett for introducing this legislation and I encourage this Committee to pass it.
- I also suggest that a separate bill be introduced to protect the information of those Montanans who have applied for and been given reimbursement payments for wolf kills in Montana and for those farmers and ranchers who have been given wolf-kill permits.
- Thank you, Mr. Chairman and members of the Committee.

Wolf Wars: A New Move to Ban Hunter Harassment

By **KATY STEINMETZ** Monday, Apr. 12, 2010

Robert Millage, 34, with a wolf he caught on the first day of hunting season in 2009 in Idaho

Robert Millage / AP

For Robert Millage, killing the first wolf in Idaho's inaugural hunt was a dubious honor. In May 2009, the gray wolf was taken off the list of endangered species for the Northern Rocky Mountain region, and debates between hunting advocates and wolf sympathizers raged in the months leading up to the start of hunting on the first of September.

Shortly after the sun rose that morning, Millage, a real estate agent from northern Idaho, shot the historic wolf. Within a few hours, he started getting angry calls — followed by angrier e-mails and Craigslist threats that included directions to his house — from people who found his contact information on his agency's website after reading his name in the news. "They didn't want to talk. They just wanted to yell," Millage says. **(See pictures of animal attacks on humans.)**

Wolves are divisive animals. To some, they are livestock-ravaging, child-endangering 120-lb. (55 kg) beasts that should be controlled through state-sanctioned hunting. Others believe they majestically embody nature in an almost spiritual way, and for this group, killing wolves seems one step away from offing Fido. "The big-bad-wolf thinking is not in line with what we understand about wolves and the ecosystem," says Mary Beth Petersen, a Minnesota attorney who e-mailed Millage after seeing a photo of him kneeling with his rifle over the wolf. But by the time hunting season ended on March 31, Millage's kill had led to extended legal protection not for the gray wolf but for another species: the Idahoan hunter.

Laws prohibiting "hunter harassment" have been passed in all 50 states, having proliferated at the behest of sportsmen organizations from 1982 to 1995. (In 1994 a similar restriction was added to the federal criminal code.) Many of these laws ban the use of physical conduct to impede a lawful hunt, such as banging pots and pans to scare off prey or taking a blowtorch to a hunter's crossbow. But other provisions have sparked outrage over First Amendment rights and have subsequently been struck down by judges for hindering hunting opponents' freedom of speech. **(See the top 10 animal stories of 2009.)**

Idaho is one of several states dealing with hunter harassment, an issue that manifests itself in unique forms across the U.S. "Harassment is a problem," says Andrew Arulanandam, spokesman for the National Rifle Association (NRA). "And what we're trying to do is make sure it isn't a problem. We're always trying to preserve the safety of hunters." The bill that recently passed both houses in Idaho — and was then signed by Governor C.L. "Butch" Otter on April 8 — extends hunter protections in two ways: by taking state-issued hunting permits, licenses and tags out of the public domain, and by making it illegal to "harass, intimidate or threaten" hunters via telephone, e-mail or website posting. (Proponents, wise to the past, added the caveat that unlawful conduct does not include constitutionally protected activity.) **(See the top 10 everything of 2009.)**

Debate about whether to remove hunting permits from the public record is reminiscent of the battle over making concealed-carry permits private, an effort that has been increasingly successful in the past few years. Supporters of such a public-records exemption say there's no reason the general public needs access to information about citizens who are simply exercising legal rights. "There are no downsides," says Idaho state representative Judy Boyle, a Republican who proposed the measure. If a hunter seems to be doing something wrong, she says, let the police investigate: "We're not vigilante people," she says. Millage, who, as a way to combat his harassment, posted on a website the vitriolic missives he received, takes the same line: "There's no reason for all the names to be handed out ... It's all about intimidation. [People say] it's not for harassment, but what other purpose does it serve?"

Government watchdogs, meanwhile, worry that taking away forms of oversight, even when there isn't a pressing need for it, sets a dangerous precedent. "We're taking another piece [of information] in order to stroke and soothe one small segment of society," says Charles Davis, executive director for the National Freedom of Information Coalition. "And if you do that over and over again, guess what's going to happen to public information at the end of the day? There's not going to be any."

The conflict in Idaho escalated in January, when Rick Hobson, a local activist, made a public-records request for the names of hunters who had killed wolves during the season, then posted all 122 on a website and took out an ad in the *Idaho Statesman* directing people to the list. "There's a small local group of hunters who feel that they and only they have a right to decide what happens to wildlife on state and federal land," he says. "I posted the list to remind them that it's a public process, that hunting is not a right, it's a privilege." **(See the top 10 green ideas of 2009.)**

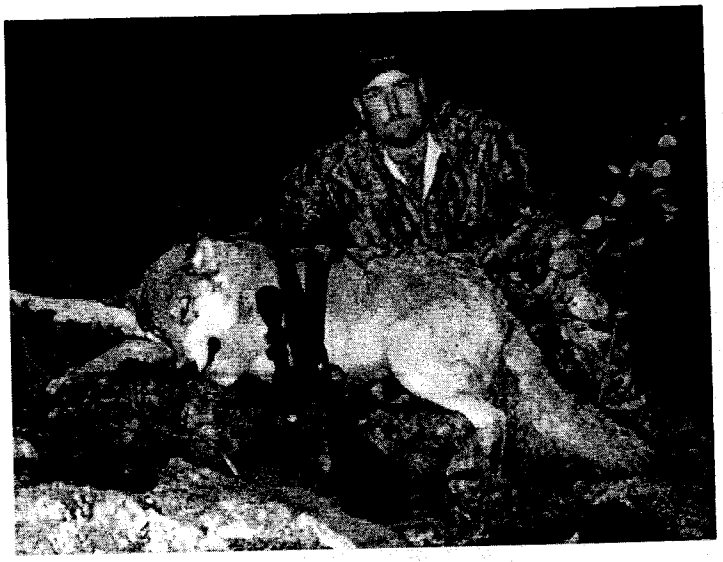
That posting brought Hobson his own barrage of hate mail and threats, in part because the list included the name of a 12-year-old boy. Boyle says Hobson's use of the information "played right into the reasoning" for making the records exempt while members debated the bill.

Other states are trying to protect hunters from different forms of harassment. A Virginia bill aimed at keeping activists from strategically (and sometimes dangerously) using food to interfere with waterfowl hunting is set to become law on April 13. In that state, it's illegal to lure birds with bait, and there have been reports of activists littering hunting spots with food — sometimes from boats in front of shooters' blinds — so that any birds that showed up would be off-limits. The measure, proposed by state delegate Scott Lingamfelter, was passed unanimously by both houses. **(See the top 10 animal stories of 2008.)**

In Wisconsin, where reports of hunter harassment more than tripled during last year's deer season, territorial landowners have clashed repeatedly with hunters, and hunters have clashed among themselves. Such reports are especially alarming in a state where there have been two fatal hunter shootings, leaving seven dead, within the past decade, says chief conservation warden Randy Stark. The increased number of reports is still minuscule in Wisconsin — there were only 15 harassment cases among 600,000 hunters — but each is treated as a potential tragedy. "Although there's few of them, it only takes one for there to be a bad outcome," says Stark. "No good can come from an emotional conflict between two armed people."

The fear of hunter-harassment clashes turning deadly is often what gains them attention, despite how rare they are among the millions of hunters who go out into the field each year. In Idaho's case, that fear has been compounded by years of tension over wolf reintroduction, as the unpopular animals were placed in Idaho by the federal government against the state's will, and by uncertainty about what it could mean to start shrouding hunters in anonymity. "Licensure has always been public, with good reason," Davis says. "Because it's a privilege you're asking the state for, and privileges can be used for all sorts of nefarious purposes."

Read more: http://www.time.com/time/nation/article/0,8599,1978911-2,00.html#ixzz1AwSUw0pv



Editor's Note: Despite the fact that wolves in the northern Rocky Mountains far exceed their recovery goals, and have been taken off the Endangered Species list in several states, anti-hunters showed their true colors in harassing Robert Millage, the first Idaho hunter to legally take a wolf in decades.

I, like many other hunters in Idaho, have been waiting the last few years for our game department to take over control of what has been allowed to become an out-of-control wolf population in many areas. We watched as recovery goals for the wolves were met, then doubled, tripled, and on and on, with no management allowed since the issue was held up in court by animal rights groups.

Meanwhile, our elk and moose in many areas were being all but exterminated, and wolves began making their presence known in local communities, in areas where they were never meant to be reintroduced.

As an Idaho resident, I am not against having a few wolf packs in the state--but I am against the non-management of a top-tier predator. The management of wolves needs to be placed in the hands of the biologists who study wildlife for a living, for the good of not only the wolf, but the other wildlife that share the forest with them.

We knew from the start that the anti-hunting crowd was going to use the wolf as a backdoor way to try and ban all hunting. If enough elk and deer were killed by the wolves, then seasons for these game species, which local people rely on to fill their freezers each fall, would have to be closed. The fact that anti-hunting groups fight so hard against wolf management even after the initial recovery goals were more than met clearly exposes their agenda.

Finally, A Chance to Hunt

I had been hearing all summer that we would finally be able to do our duty as sportsmen and help with predator control, as managed by the state's professional game biologists this fall. I made sure to purchase my wolf tag the first day it went on sale. Like many, I bought it more as a statement than anything. I waited for the usual outcome of a federal judge suspending the season once more in order to listen to whatever drummed-up excuse the anti-hunting crowd produced this time. But as the season approached, I decided if the hunt happened, I would dedicate my time toward trying to tag one of these predators.

As a fifth generation Idahoan and avid outdoorsman, I spend more than 100 days a year in the forests of Idaho. I have watched as our elk herds dwindled, and seen with my own eyes the aftermath of elk herds caught in deep snow by wolf packs, and the absolute carnage left behind to rot. I have had many friends lose hunting dogs, pets, and livestock to the wolf as well. I also have come to enjoy the howls of wolves, and the added element of wildness they add to the backcountry. I knew that if the season went forward, I had some pretty good ideas about where to locate wolves.

I planned to hunt the first two days of the season, and after a non-ruling by a federal judge, which meant the hunt could take place, I headed into the mountains. I knew of an area with an over-abundance of wolves--so much so that hunter success rates in the area for elk had fallen by more than 90 percent in a decade. I planned on checking multiple drainages for sign, and to listen for howls to locate a pack. At about dark on the evening before the opener, I finally heard the howls I was listening for from a drainage below. I decided this would be the place I would hunt and went to the nearest site to set camp.

I pretty much stayed awake all night, and I was back in the forest with wolves still howling around me about 1-1/2 hours before sunrise. I set up in the dark in the middle of a rock slide, as that would give me the

open ground needed to predator-call in a wolf. After what seemed to take forever, the sun finally began to light the forest around me. When I could see clearly into the timber, as well around the open rock slide, I began to call. I used a coyote distress call, after much deliberation over which of the various calls in my pack I would use.

After about 20 minutes of calling, a female wolf appeared from the timber below. Acting on instinct, I brought my Tikka .243 to my shoulder. Upon settling the crosshairs of my Burris scope behind the wolf's shoulder, her expression changed as she winded me, but it was too late as my rifle cracked, and the 100-grain Core-Lokt bullet dropped her in her tracks. I felt the mixed emotions only other hunters can know as I sat for several minutes taking in the hunt, and the fact I had just taken a wolf in Idaho.

I went to work taking some photos to share with friends and family, and then to the skinning task ahead. I continued to have wolves howl around me, even as I made my way back up the mountain to my SUV. With the hot late summer temperature, my main thoughts were of transporting the wolf the seven or so hours out of the mountains and down to the nearest Fish and Game office to have it checked, so I could get it to the taxidermist before the hide started to slip. I tucked the hide up on the passenger side floorboard, turned the AC on high, and started my drive.

"Sick, Bloodthirsty Moron!"

Upon reaching the Fish and Game office in Lewiston, Idaho, I was greeted by the lady at the front desk, who seemed a little shocked when I reported I was there to check a wolf. "Really?" she replied. The Fish and Game office turned into a whirlwind of activity, as everyone wanted to see the wolf, and this was the first time they had one to check. One of the officers asked if I cared if they called the local media, and thinking "small town paper," I told him I was fine with that. After an hour or so of dealing with the check-in process and the press, I was ready to get to the taxidermist, so I could drop off the wolf and head home, as I was plenty tired.

While pulling out of the Fish and Game office my cell phone rang. It was the Associated Press calling, and it was at that point the magnitude of my wolf hunt began to set in. By the time I dropped off the wolf and made the 1-1/2 hour drive home, my phone and e-mail were flooded with calls and messages from various press outlets wanting the story--and anti-hunters calling me every name in the book.

The barrage of hate calls and emails was something else. These people had to be just sitting and waiting to hear of the first wolf taken, so they could set to work harassing the first successful hunter. Being a real estate agent, I was easy to find. The foulness of the language, complete lack of common decency, or any desire to actually debate the issue in a civil matter are what shocked me the most.

Here's one example: "To think that this beautiful creature will never run wild again because of a sick, bloodthirsty moron like yourself is almost too much to think!! I love hunting accidents. I hope you get yours soon."

Most didn't say they would kill me directly, they just wished me dead. Others sent messages to my fellow agents and my broker, hoping I will lose my job.

Having opposing views and debating them to find common ground and a solution is American. Trying to force someone to agree with and abide by your point of view through harassment and intimidation is not. I

definitely have been witness to the ugly side of the anti-hunting crowd during the last week. I am thick-skinned, and I have tried not to let any of this bother me, but it has taken a toll through the clogging up of my e-mail and phone, making work all but impossible. I also have children, and having to worry about their safety, and that of my own, since these idiots are even going so far as to post maps with directions on how to locate me, has caused me some unneeded stress. People have asked why I don't change my phone number, and I can only reply that is not my style. I will not be dictated to or intimidated by others. It is not the way I was raised and who I was brought up to be. I take every call, good or bad.

On a positive note, the outpouring of support from fellow hunters, and average rural people living with the results of our wildlife management, or lack thereof, has been nothing short of amazing. To have a complete stranger call to yell profanities at you is one thing; to have a stranger call and let you know they stand behind you, well that is profound, and it carries 100 times more weight in my book.

"Do the Hunting Community Proud"

I have a hard time even grasping the situation I have been thrust into, and my biggest concern is to try my best to do the hunting community proud and give those who oppose hunters nothing that can be turned against us. I have made that my mission, and I have been spending the last few days trying to respond to all of the messages of support, if even just with a simple "thank you," since anyone who took time from their day deserves a response. I have ignored the e-mails of harassment, except for a few that actually had questions and points to debate, which I responded to in the best way I could. The negative messages have decreased. I think the fact that they could not get me to respond back in an angry and irrational way confounded them, and they didn't know how to respond to it.

We as hunters need to stick together, as our traditions and way of life are continually threatened by those who lack an understanding of the circle of life and ways of nature that only those of us who interact with our wild lands truly understand. No one is a bigger defender of wildlife than hunters. Without wildlife, hunters we would no longer be.

Find out more: http://www.nrahuntersrights.org/Article.aspx?id=2401

House approves hunter identity protection bill

By Dustin Hurst

March 4th, 2010

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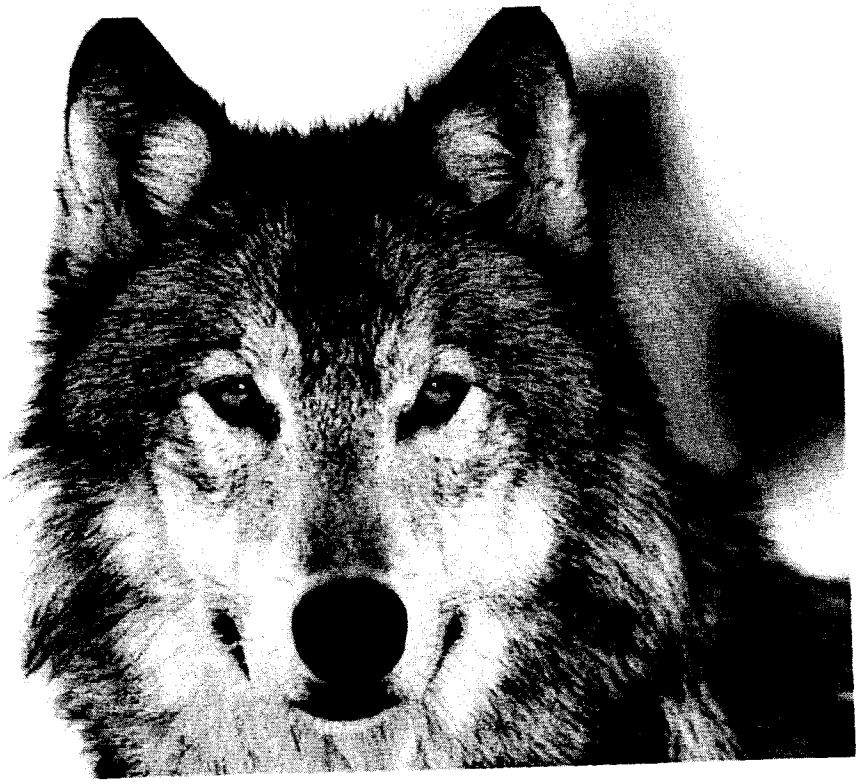

House members voted 55-14 to protect the identity of hunters in Idaho

The Idaho House approved a measure which would protect the identity of anyone who purchases any type of hunting license from the state of Idaho. The vote among House members was 55-14 to approve the measure, which now heads to the Senate.

The bill is the product of Rep. Judy Boyle, R-Midvale, who, in the committee hearing on the bill, said that she believes "that one of the reasons for government is to protect its citizens, and I feel that's what this bill will do." The legislation provides that all licenses issued by the Idaho Department of Fish and Game would be exempt from the Freedom of Information Act, a piece of legislation designed to give the public greater access to government records and documents. Boyle noted that not only deer, elk, and wolf tags would be protected, but wolf-kill permits, typically issued to farmers and ranchers as a herd-protection measure, would also fall under the exemption.

Boyle said that on the second day of the wolf hunt in Idaho in 2009, she received a call from a concerned wolf hunter who was the subject of harassment from wolf advocates. The man who contacted Boyle had purchased a license from the state, killed a wolf, and subsequently had his personal information posted online by Rick Hobson. On the House floor, Boyle read from a

website posted by that constituent, which lists harassing e-mails received after his information was posted online by a wolf advocate. (View the website here. Warning: some comments contain explicit language.)

Rep. Phylis King, D-Boise, said Boyle's plan missed the target and would only work to close records to the public. King argued that privacy laws shouldn't be tightened, but said that stalking laws should actually be strengthened to prevent harassment.

Rep. George Sayler, D-Coeur D'Alene, said the bill presents a conflict between the right of privacy and the right of the freedom of the press, and goes too far in protecting hunters because it protects hunters who might not be hunting controversial game, such as elk or deer.

Rep. JoAn Wood, R-Rigby, said the responsibility of government is to protect the citizenry from harassment. Wood said that people have the right to their opinions on wolf hunting, but making bodily threats takes it too far. She added that protection of citizens is more important than openness of government for newspapers.

A former newspaper publisher, Rep. Steve Hartgen, R-Twin Falls, said that he has dealt with government privacy issues in the past and debated in opposition to the measure, because he said the legislation "flies in the face" of the state's constitution. Hartgen said he would favor King's idea of strengthening anti-harassment and anti-stalking laws as a solution for the harassment suffered by hunters.

Anonymity on the Internet prevents effective enforcement of anti-harassment laws, said Rep. Erik Simpson, R-Idaho Falls. Simpson argued that the only manner in which Idaho can protect hunters is exempting their names from public records requests.

"How do we go after Nobody-1321418 (one of the bloggers who posted on the website mentioned above)?" said Simpson.

"Forget the media," said Lenore Hardy Barret, R-Challis. Barret joined Boyle in claiming that the right of protection guaranteed to citizens by the government is more important than the media's "obsession" with government records.

(Note: The man who initially posted hunters' personal information online, Rick Hobson, thinks Boyle's bill is an assault on free speech. Read his comments here.)

Idaho

West's Idaho Code Annotated Currentness. Title 36. Fish and Game. Chapter 15. Public Safety. § 36-1510. Interference with hunting, fishing, trapping or wildlife control

Statute Details
Printable Version

Citation: ID ST § 36-1510

Citation: I.C. § 36-1510

Last Checked by Web Center Staff: 09/2010

Summary: This section comprises Idaho's hunter harassment law. Under the law, no person shall intentionally interfere with the lawful taking or control of wildlife by another; intentionally harass, bait, drive or disturb any animal for the purpose of disrupting lawful pursuit; or damage or destroy in any way any lawful hunting blind with the intent to interfere. Idaho also expands these activities to include the harassment, intimidation, or threatening of any person who is or was lawfully engaged in the taking of fish or wildlife by such means as personal or written contact, telephone, e-mail, or a website. Every person convicted or entering a plea of guilty or of nolo contendere for violation of this section is subject to a fine of not to exceed $1,500 or confinement for 6 months in the county jail, or both. Further, any person damaged by prohibited acts may recover treble civil damages and a person can obtain an injunction against violations of this law.

Statute in Full:

(1) No person shall:

(a) Intentionally interfere with the lawful taking or control of wildlife by another; or

(b) Intentionally harass, bait, drive or disturb any animal for the purpose of disrupting lawful pursuit or taking thereof; or

(c) Damage or destroy in any way any lawful hunting blind with the intent to interfere with its usage for hunting; or

(d) Harass, intimidate or threaten by any means including, but not limited to, personal or written contact, or via telephone, e-mail or website, any person who is or was engaged in the lawful taking or control of fish or wildlife.

(2) Any fish and game enforcement officer or peace officer who reasonably believes that a person has violated provisions of this section may arrest such person therefor.

(3)(a) The conduct declared unlawful in this section does not include any incidental interference arising from lawful activity by land users or interference by a landowner or members of his immediate family arising from activities on his own property.

(b) The conduct declared unlawful in this section does not include constitutionally protected activity.

(4) Every person convicted or entering a plea of guilty or of nolo contendere for violation of this section is subject to a fine of not to exceed one thousand five hundred dollars ($1,500) or confinement for six (6) months in the county jail, or both such fine and confinement.

(5) In addition to the penalties provided in subsection (4) of this section, any person who is damaged by any act prohibited in this section may recover treble civil damages. A party seeking civil damages under this subsection (5) may recover upon proof of a violation of the provisions of this section by a preponderance of the evidence. The state of Idaho, or any person may have relief by injunction against violations of the provisions of this section. Any party recovering judgment under this subsection (5) may be awarded a reasonable attorney's fee.

CREDIT(S)

S.L. 1987, ch. 288, § 1; S.L. 1992, ch. 81, § 36. Amended by S.L. 2010, ch. 245, § 3, eff. April 8, 2010.

Cite as State v. Lilburn, 875 P.2d 1036 (Mont. 1994), cert. denied, - U.S. - (1995).

STATE of Montana, Plaintiff and Appellant,

V.

John LILBURN, Defendant and Respondent.

No. 93-404.

Supreme Court of Montana.

Submitted April 19, 1994.

Decided June 9, 1994.

Joseph P. Mazurek, Atty. Gen., Chris Tweeten (argued), Chief Deputy Atty. Gen., Helena, Mike Salvagni, Gallatin County Atty., Bozeman, for appellant.

Richard Ranney (argued) and Shelton Williams, Williams & Ranney, Noel K. Larrivee, Larrivee Law Offices, Missoula, for respondent.

Lon J. Dale, Milodragovich, Dale & Dye, Missoula for amicus curiae Montana Shooting Sports Ass'n, Inc., Western Montana Fish and Game Ass'n, Inc., and Michigan United Conservation Clubs.

TRIEWEILER, Justice.

Defendant John Lilburn was charged in the Gallatin County Justice Court with the offense of hunter harassment in violation of section 87-3-142(3), MCA. He was convicted of that charge following a jury trial and appealed his conviction to the District Court for the Eighteenth Judicial District in Gallatin County. The District Court held that section 87-3-142, MCA, in its entirety, is facially unconstitutional in that it is both overbroad and vague, impermissibly infringing on the First Amendment right to free speech and the Fourteenth Amendment right to due process guaranteed by the United States Constitution.

We reverse the District Court.

The State raises the following issues on appeal:

1. Is Montana's Hunter Harassment Law, found at section 87-3-142, MCA, void because it is overbroad in violation of the First Amendment to the United States Constitution?

2. Is section 87-3-142, MCA, void because of vagueness in violation of the Fourteenth Amendment to the United States Constitution?

In March 1990, the Department of Fish, Wildlife, and Parks

(DFWP) allowed three persons whose names had been drawn from a permit pool to hunt bison which had migrated from Yellowstone National Park. One of the persons who received a permit was Hal Slemmer.

On the morning of the hunt, when the DFWP personnel located the bison, a group of 11 persons on snowmobiles and crosscountry skis were seen attempting to herd the bison back into the park. The demonstrators were warned that this was a legal hunt, and were told not to interfere with the hunters. The hunters were also warned about the presence of the demonstrators and were cautioned to conduct the hunt safely.

Warden David Etzwiler of the DFWP accompanied Slemmer to a clearing where the bison were crossing. When one of the animals was in sight, Slemmer sighted his rifle and prepared to pull the trigger. At that time, John Lilburn, one of the protesters, moved in front of Slemmer, placing himself between Slemmer and the targeted bison at a distance of 10 to 12 feet from the muzzle of Slemmer's rifle. Slemmer lifted his rifle when he saw Lilburn's head and shoulders come into the scope of the gun. Warden Etzwiler approached Lilburn and told him that this was a lawful hunt and not to interfere. Slemmer moved about six feet to his left and selected another bison from the group. He raised his rifle and took aim through the scope. Lilburn again moved in front of Slemmer. Slemmer testified that when he saw Lilburn's face in his scope, he "jerked the gun up quickly because I had been squeezing on the trigger."

Warden Etzwiler and Slemmer got on their snowmobiles and moved to a different area where Slemmer shot and killed a bison before Lilburn and the other protesters caught up with them.

No arrests were made at that time. However, after DFWP officials conferred with the Gallatin County Attorney, Lilburn was charged with the offense of harassment, a misdemeanor, in violation of section 87-3-142(3), MCA. The complaint filed against Lilburn in the Gallatin County Justice Court alleged that he disturbed a hunter with the intent to dissuade or prevent the taking of a bison when he placed himself between the bison and the hunter who was aiming a loaded rifle at the animal.

None of the other protesters were charged with a violation of this same statute.

Lilburn filed a declaratory judgment action in Federal District Court challenging the constitutionality of section 87-3-142(3), MCA, on a First Amendment basis. The U.S. District Court dismissed Lilburn's complaint, [855 F. Supp 327 (D.Mont. 1991)] holding that there were no special circumstances warranting federal intervention in an ongoing state criminal action, and therefore, Lilburn's case did not merit an exception to the abstention doctrine enunciated in Younger v. Harris (1971), 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669. As a basis for its conclusion, the Federal Court concluded that the goal of the statute "is clearly

reasonable" because "hunting is a legitimate activity which the state may protect in any reasonable and constitutionally permissible manner" and that this statute primarily "proscribes behavior which interferes with an individual actually engaged in the lawful taking of a wild animal."

The Ninth Circuit Court of Appeals subsequently affirmed the U.S. District Court's dismissal of Lilburn's constitutional challenge. Lilburn v. Racicot (9th Cir. July 13, 1992), No. 91-35310.

Lilburn was convicted following a jury trial in Gallatin County Justice Court. He appealed his conviction to the District Court and alleged that the harassment statute was unconstitutionally overbroad and vague. By order dated June 24, 1993, the District Court reversed the conviction and dismissed the complaint brought against Lilburn based on its determination that section 87-3-142, MCA, is unconstitutional on its face, and therefore, is invalid. The State appeals.

STANDARD OF REVIEW

A legislative enactment is presumed to be constitutional and will be upheld on review except when proven to be unconstitutional beyond a reasonable doubt. City of Billings v. Laedeke (1991), 247 Mont. 151, 154, 805 P.2d 1348, 1349 (citing Fallon County v. State (1988), 231 Mont. 443, 445-46, 753 P.2d 338, 339-40).

ISSUE 1

Is Montana's Hunter Harassment Law, found at section 87-3-142, MCA, void because it is overbroad in violation of the First Amendment to the United States Constitution?

The statute at issue in this appeal, commonly known as Montana's Hunter Harassment Law, provides as follows:

> 87-3-142. Harassment prohibited.
> (1) No person may intentionally interfere with the lawful taking of a wild animal by another.
>
> (2) No person may, with intent to prevent or hinder its lawful taking, disturb a wild animal or engage in an activity or place in its way any object or substance that will tend to disturb or otherwise affect the behavior of a wild animal.
>
> (3) No person may disturb an individual engaged in the lawful taking of a wild animal with intent to dissuade the individual or otherwise prevent the taking of the animal.
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> (4) Nothing in this section prohibits a landowner or lessee from taking reasonable measures to prevent imminent danger to domestic livestock and equipment.

Lilburn was convicted of violating subsection (3) of this

statute because he twice disturbed Slemmer's attempt to lawfully shoot a bison when he placed his body between Slemmer and the animal. The District Court, in its analysis of subsection (3) for overbreadth, concluded that section 87-3-142(3), MCA is "obviously content-based" because it prohibits communication which is intended to dissuade a person from hunting, while allowing communication which encourages hunting," The court further concluded that the statute's prohibition would encompass "all verbal and expressive conduct which has the intention to dissuade from hunting," and therefore, such things as "prayer vigils at trailheads, the singing of protest songs or the burning of hunting maps, if done with the intent to dissuade a hunter, would be violations of the statute." Therefore, the court held that to the extent the statute "implicates constitutionally protected speech and expressive conduct, it is overbroad."

On appeal, the State contends that the court erred when it invalidated section 87-3142(3), MCA, on the basis of overbreadth because the statute primarily proscribes conduct rather than speech, and to the extent that protected expression is reached, it regulates on a content-neutral basis only the time, place, and manner of expression. The State asserts that the statute is not overbroad because any potential unconstitutional applications are speculative and insubstantial when judged against the plainly legitimate scope of this statute which is to promote safety in sport hunting and protect those engaged in lawful activities from interference. We agree.

We note first that Lilburn has raised a facial constitutional challenge and does not aver that the statute, as applied to him, unconstitutionally abridges his First Amendment guarantee of freedom of speech. Lilburn was not charged on the basis of any idea or view that he expressed, and he does not contend that his own conduct, which formed the basis of the charges brought against him, was constitutionally protected. Instead, he contends that the statute, as written, could potentially reach a substantial amount of protected speech or expressive conduct.

A facial overbreadth challenge is an exception to the general rule that statutes are evaluated in light of the situation and facts before the court. R.A.V. v. St. Paul (1992), - U.S. -, -, 112 S.Ct. 2538, 2558, 120 L.Ed.2d 305, 336 (J. White, concurring) (citing Broadrick v. Oklahoma (1973), 413 U.S. 601, 610, 93 S.Ct. 2908, 2915, 37 L.Ed.2d 830, 838-39). This Court has similarly recognized that a statute which can be applied to constitutionally protected speech and expression may be found to be invalid in its entirety, even if it could validly apply to the situation before the court. City of Whitefish v. O'Shaughnessy (1985), 216 Mont. 433, 704 P.2d 1021.

In his overbreadth challenge, Lilburn disputes the State's assertion that the statute primarily regulates conduct but contends that it criminalizes a broad category of speech and expressive conduct based on its content. He claims that the law reaches primarily conduct which conveys an antihunting sentiment, while

allowing, under exactly the same circumstances, conduct and speech which conveys any other message. Lilburn cites R.A.V. v. St. Paul, - U.S. at -, 112 S.Ct. at 2542, 120 L.Ed.2d at 316, for the proposition that the statute is "facially unconstitutional in that it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses."

Broadrick, 413 U.S. 601, 93 S.Ct. 2908, is the leading case addressing the First Amendment overbreadth doctrine. In Broadrick, the Supreme Court clarified that a statute or government regulation should be invalidated on the basis of facial overbreadth in only limited situations:

> In such cases, it has been the judgment of this Court that the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted and perceived grievances left to fester because of the possible inhibitory effects of overly broad statutes.
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> . . . .
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> ... Application of the overbreadth doctrine in this manner is, manifestly, strong medicine. It has been employed by the Court sparingly and only as a last resort. Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute. [Citations omitted].

Broadrick, 413 U.S. at 612-13, 93 S.Ct. at 2916. The Court in Broadrick adopted limitations on the overbreadth doctrine "particularly where conduct and not merely speech is involved," and held that a statute which has constitutional applications may be facially invalidated for overbreadth only if its overbreadth is "real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." Broadrick, 413 U.S. at 615, 93 S.Ct. at 2?18. The Court made clear that the existence of imaginary potential unlawful applications does not by itself render a statute facially overbroad. Broadrick, 413 U.S. at 615, 93 S.Ct. at 2918.

In Members of the City Council v. Taxpayers for Vincent (1984), 466 U.S. 789, 800-01, 104 S.Ct. 2118, 2126, 80 L.Ed.2d 772, 783-84, the Supreme Court further explained the parameters of the overbreadth doctrine:

> It is clear ... that the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge. On the contrary, the requirement of substantial overbreadth stems from the underlying justification for the overbreadth exception itself-the interest in preventing an invalid statute from inhibiting the speech of third parties who are not before the Court . . . In short, there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds.

After reviewing the statute in question and the arguments set forth by Lilburn, we conclude that this is precisely the type of situation where the limitations imposed by the Supreme Court on the overbreadth doctrine must be carefully applied. Before the hunter harassment statute can be invalidated on its face, there must be a clear showing that the potential invalid applications of the statute be both "real and substantial." For the reasons stated below, we conclude that no such showing has been made in this case.

Under the tests articulated in Broadrick and Taxpayers for Vincent, we must determine whether there is a real and substantial probability that section 87-3-142(3), MCA, will compromise recognized First Amendment protections when judged in relation to any "plainly legitimate sweep" of the statute.

The District Court based its holding regarding overbreadth on its determination that the statute is "obviously content-based" and could potentially proscribe

> all verbal and expressive conduct which has the intention to dissuade from hunting. Conduct such as prayer vigils at trailheads, the singing of protest songs or the burning of hunting maps, if done with the intent to dissuade a hunter, would be violations of the statute. [Emphasis added].

It was the court's opinion that the statute prohibits communication which is intended to dissuade a person from hunting, while allowing a communication which encourages hunting, even if such communication prevents or distracts a hunter from taking the prey. While this analysis was not necessary to an overbreadth analysis under Broadrick, we also disagree with this interpretation of the statute.

All statutes carry with them a presumption of constitutionality and it is a duty of the courts to construe statutes narrowly to avoid constitutional difficulties if possible. Montana Automobile Association v. Greely (1981), 193 Mont. 378, 382, 632 P.2d 300, 303; State v. Ytterdahl (1986), 222 Mont. 258, 261, 721 P.2d 757, 759. This Court made clear that, when construing a statute, it must be read as a whole, and terms used in the statute should not be isolated from the context in which they are used by the Legislature. McClanathan v. Smith (1980), 186 Mont. 56, 61, 606 P.2d 507, 510. Furthermore, a statute must be construed according to the plain meaning of the language used therein. Norfolk Holdings, Inc. v. Department of Revenue (1991), 249 Mont. 40, 43, 813 P.2d 460, 461.

Section 87-3-142(3), MCA, prohibits a person from disturbing another individual engaged in the lawful taking of a wild animal with intent to dissuade the individual or otherwise prevent the taking of the animal. The term "wild animal" is defined to mean "any game animal, forbearing animal, or predatory animal," and a "taking" is defined to include "pursuit, hunting, trapping, shooting, or killing of a wild animal on land upon which the affected person has the right or privilege to pursue, hunt, trap,

shoot, or kill the wild animal." Section 87-3-141, MCA.

The plain language of the statute, considered in light of these limiting definitions, makes clear that the statute's proscriptions reach only activities which occur in the field during an otherwise lawful hunt. While the disturbance which is prohibited may, under other circumstances, result from a verbal utterance, it makes no difference what the content of the verbal utterance is. The language of the statute does not support the assertion that the statute is aimed primarily at pure speech and expressive conduct conveying only an anti-hunting sentiment. The disturbance could just as well be caused by shouting "fire!"

Lilburn disagrees that the statute regulates primarily conduct and claims that the Legislature's inclusion of the word "dissuade" demonstrates that the intent of the statute is to proscribe only a very small class of expression which is uttered or carried out with the intent to dissuade a hunter from taking an animal. He contends it is the Legislature's use of the term "dissuade" that renders this a content-based regulation.

The Supreme Court has provided clear guidelines for distinguishing a content-neutral regulation from one which is impermissibly content-based:

> The principal inquiry in determining content neutrality ... is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. [Citation omitted].

Ward v. Rock Against Racism (1989), 491 U.S. 781, 791, 109 S.Ct. 2746, 2754, 105 L.Ed.2d 661, 675. The determination of whether a regulation is content-based turns not on whether its incidental effects fall more heavily on expression of a certain viewpoint, but rather on whether the governmental purpose to be served by the regulation is not motivated by a desire to suppress the content of the communication. City of Renton v. Playtime Theatres, Inc. (1986), 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29. Therefore, even if a statute has a discriminatory impact, it can be determined to be content-neutral if its objective neither advances nor inhibits a particular viewpoint.

Neither of the parties dispute the fact that safety and an orderly regulation of hunting are legitimate state goals. This Court has made clear that "[i]n the area of wildlife regulation, it is sufficient to state the Legislature may impose such terms and conditions as it sees fit, as long as constitutional limitations are not infringed."' State v. Jack (1975), 167 Mont. 456, 460, 539 P.2d 726, 728.

Here, the legislative history demonstrates a motivation for

adoption of this statute which is unrelated to the suppression of speech based on content. The Legislature was aware that confrontations between hunters and opponents of sport hunting, particularly with respect to the controversial bison hunts, could occur in the field when hunters were armed and actively pursuing their prey. It was recognized that this posed a serious danger to both the hunters and those interfering with their activities.

Contrary to the court's conclusion that the legislation was obviously content-based because it was prompted by past activities opposing the bison hunts, the legislative history supports a conclusion that the motivation was to prevent violent confrontations and to prevent interference with lawful activities. Moreover, we do not find any support in the legislative history for the contention that this was an attempt to silence the views of those opposed to the bison hunt or other types of sport hunting. It was recognized that persons opposed to sport hunting had the right to express their views, but that there were other forums more suited to political discourse.

While Lilburn asserts that the use of the word "dissuade" relates the statute entirely to speech and expressive conduct, we note that the Legislature did not use the word "dissuade" in isolation. Reading the statute as a whole, it is clear that the conduct proscribed is the "disturbance" of a hunter engaged in a lawful activity, when it is done with the intent to either dissuade the hunter or to prevent the taking of the animal. The fact that speech, or actions may disturb a hunter is not dependent on the content of what is expressed, or whether it is prompted by an anti-hunting sentiment. A person could blurt out anything at the moment a hunter is trying to shoot, and this could "disturb" the hunter by distracting him or her, or by scaring the animal away. The content of what was said would be irrelevant. Or, persons could attempt to prevent the talking of the animal for reasons other than opposition to hunting, such as a desire to shoot the animal themselves. Furthermore, in either of these instances, before the conduct would be culpable, the necessary scienter would have to be proven.

We recognize that the consequences of this statute may fall more heavily on persons opposed to hunting than on those with different viewpoints, but this does not by itself render the statute content-based. The existence of a content-neutral motivation for the statute is all that is required under Ward and Renton to refute the characterization that the statute impermissibly regulates speech or conduct based on the message conveyed. We are satisfied that such a motivation exists in this instance. Therefore, we reject the District Court's conclusion that the statute is content-based.

Even though we disagree with the District Court's rationale for a holding of over-breadth, we realize, as conceded by the State, that there may be instances where protected expression or pure speech may violate the statute. However, before invalidating the statute on the basis of overbreadth, we must consider the limitations set forth in Broadrick to determine if the possible

unconstitutional applications are real and substantial when judged in relation to the plainly legitimate scope of the statute.

Lilburn contends that there are a significant number of situations where the law could be applied in an unconstitutional manner and urges the Court to "use our imagination to think of the various ways the statute might be applied against speech or expressive conduct." However, the test is not whether hypothetical remote situations exist, but whether there is a significant possibility that the law will be unconstitutionally applied. Broadrick, 413 U.S. at 615, 93 S.Ct. at 2918.

Based on our conclusion that the plain language of the statute is directed primarily at conduct and if at speech, then without regard to its content, we conclude, in the absence of evidence otherwise, that Lilburn has not shown that any overbreadth of the statute is "substantial ... judged in relation to the statute's plainly legitimate sweep." Broadrick, 413 U.S. at 615, 93 S.Ct. at 2918.

Finally, we address the District Court's comparison of the Montana statute to a Connecticut hunter harassment statute which was held unconstitutional on the basis of overbreadth. Dorman v. Satti (D.Conn. 1988), 678 F.Supp. 375, aff'd, 862 F.2d 432 (2nd Cir.1988), cert. denied (1989), 490 U.S. 1099, 109 S.Ct. 2450, 104 L.Ed.2d 1005.

The Federal District Court, when it rejected Lilburn's constitutional challenge, noted that Montana's hunter harassment statute is distinguishable from the Connecticut statute, and does not unconstitutionally interfere with free speech. In Dorman, the statute reached conduct which interfered with both the actual taking of game and with "acts in preparation" for the taking of game. The court held that the statute could legitimately proscribe interference with "lawful taking," but not "acts in preparation":

> So long as the legislature elects to permit hunters to pursue their activity on property, during times, and under circumstances set aside for that purpose, it may also regulate the conduct of nonhunters in those contexts. Considerations of safety, alone, would justify such regulation, even if it impinges incidentally upon protected speech. On the other hand, the propriety of hunting and taking wildlife is a fair subject for spirited debate. Once a hunter is outside the scope of his "lawful hunt" he is no different from any other unreceptive listener who must, "in vindication of our liberties," be "exposed to the onslaught of repugnant ideas." [Emphasis added].

Dorman, 678 F.Supp. at 383.

The statute at issue in this case, section 87-3142(3), MCA, is clearly limited in scope to activities which interfere with persons actively engaged in the lawful taking of an animal and does not suffer from the same overbreadth as the statute in Donnan.

We hold that section 87-3-142(3), MCA, is not unconstitutionally overbroad. To the extent that the statute may reach constitutionally protected expression, we conclude, as did the Supreme Court in Broadrick, 413 U.S. at 615-16, 93 S.Ct. at 2917-18, that whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations where the statute is assertedly being applied unconstitutionally.

ISSUE 2

Is section 87-3-142, MCA, void because of vagueness in violation of the Fourteenth Amendment to the United States Constitution?

The District Court also invalidated the hunter harassment statute on the basis of vagueness. The court concluded that several key terms are left undefined, and that the statute impermissibly leaves to the discretion of law enforcement and the courts, without specific statutory guidance to law enforcement officers or the public at large, what type of conduct is prohibited.

In Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc. (1982), 455 U.S. 489, 497, 102 S.Ct. 1186, 1193, 71 L.Ed.2d 362, 371, the Supreme Court set forth guidelines for analyzing a facial challenge on the basis of overbreadth and vagueness. When such a challenge is raised, a court must first determine whether the enactment reaches a substantial amount of constitutionally protected conduct. Here we have concluded that the statute does not, and that the overbreadth challenge must fail. The Supreme Court has also made clear that if the challenged statute is reasonably clear in its application to the conduct of the person bringing the challenge, it cannot be stricken on its face for vagueness. Hoffman Estates, 455 U.S. at 494-95, 102 S.Ct. at 1190-91. "One to whose conduct a statute clearly applies may not successfully challenge it for vagueness. Parker v. Levy (1974), 417 U.S. 733, 756, [94 S.Ct. 2547, 2562, 41 L.Ed.2d 4391." Hoffman Estates, 455 U.S. at 495 n. 7, 102 S.Ct. at 1191 n. 7.

In this instance, regardless of the hypothetical situations that may exist, Lilburn's conduct was unquestionably proscribed by the hunter harassment statute. Lilburn intentionally twice stood between Slemmer and the targeted bison, directly in the line of fire, in order to prevent the animal from being shot. It is difficult to conceive of an argument that Lilburn did not "disturb" Slemmer while Slemmer was engaged in the lawful taking of a wild animal with the intent to prevent or dissuade him from making the shot.

We conclude that Lilburn does not have standing to raise a facial vagueness challenge. The court's order with respect to the issue of vagueness is reversed on this basis.

We reverse the District Court's conclusion that the statute

under which Lilburn was charged is impermissibly overbroad and vague, and vacate the court's dismissal of the charges brought against Lilburn. Furthermore, although Lilburn's constitutional challenge focused only on subsection (3) of the statute, the language of the District Court's order invalidated section 87-3-142, MCA, in its entirety. We find no basis in the record for the court's determination that the remaining sections of the statute are constitutionally deficient. We, therefore, reverse the order of the District Court with regard to all parts of section 874-3-142, MCA.

This case is remanded to the District Court for further proceedings consistent with this opinion.

TURNAGE, C.J., and GRAY, NELSON, WEBER, HARRISON and HUNT, JJ., concur.